6-20-07

(3)

No. 06-1327

IN THE

Supreme Court of the United States

STATE OF UTAH,
Petitioner,

v.

MICHAEL VON FERGUSON,
Respondent.

On Petition for a Writ of Certiorari
to the Utah Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

If an uncounseled misdemeanant is fined and sentenced to suspended jail time in violation of the Sixth Amendment as outlined in *Alabama v. Shelton*, 535 U.S. 654 (2002), is the underlying conviction valid for purposes of enhancing a subsequent criminal charge from a misdemeanor to a felony?

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STATEMENT OF THE CASE

Summary of Proceedings

In an Amended Information filed April 11, 2003, the State of Utah charged Respondent, Michael Von Ferguson, with four felonies, including violation of a protective order, a third degree felony because of a prior protective order violation conviction. R. 20-23. Ferguson has been in pretrial custody at the Salt Lake County Jail for over four years since March 24, 2003, the date of the alleged incident in this case. R. 1.

A magistrate bound Ferguson over for trial on charges of attempted homicide and felony violation of a protective order, and dismissed the other charges. R. 336:88-90. Following bindover, the trial court granted Ferguson's motion to dismiss the enhancement element of the protective order violation charge, and entered an order dismissing that felony charge and allowing the State to proceed on the protective order count as a class A misdemeanor. R. 285-88; Pet. App. 44-47. The trial court stated in part:

> Defendant Ferguson did not have counsel at the time he entered his guilty plea [on the prior protective order charge] and received a suspended sentence, therefore the prior conviction cannot be used to enhance count II unless the State presents evidence that the defendant knowingly and voluntarily waived his right to counsel. The Court disagrees with the State's argument that *Shelton* only invalidates the jail sentence given pursuant to an UNCOUNSELED misdemeanor, and does not impact the conviction itself.

Pet. App. 47 (emphasis in original).

The State petitioned the Utah Court of Appeals, seeking interlocutory review of the trial court order. On direct appeal, the court of appeals unanimously agreed with the trial court that a prior misdemeanor conviction obtained in violation of the Sixth Amendment as outlined in *Alabama v. Shelton*, 535 U.S. 654 (2002), cannot be used to enhance a subsequent charge to a

felony. Pet. App. 23-34. The State petitioned the Utah Supreme Court for certiorari review of the court of appeals' decision on this issue.

Utah Supreme Court Decision

The Utah Supreme Court unanimously agreed with both lower Utah courts that an uncounseled misdemeanor conviction with a suspended jail sentence obtained in violation of *Shelton* and the Sixth Amendment cannot be used to enhance a subsequent charge from a misdemeanor to a felony. Pet. App. 6-14. The court reasoned that *Shelton* and other case law from this Court demonstrates "that a conviction obtained in violation of the Sixth Amendment, not merely the offending sentence, would be constitutionally infirm." Pet. App. 10. It pointed out that in *Shelton*, this Court "repeatedly described the Sixth Amendment as protecting against invalid convictions, not merely invalid sentences[,]" and "[n]owhere did the Court indicate that an offending sentence could be severed from an invalid conviction, somehow resurrecting the conviction's validity as the State suggests here." Pet. App. 10-11. Accordingly, the Utah Supreme Court concluded that an uncounseled conviction with a suspended sentence, obtained in violation of *Shelton* and the Sixth Amendment, could not be used to support conviction in a subsequently enhanced charge.

> [U]nder *Shelton*, the Sixth Amendment attached to Ferguson's prior conviction when he received a one-year suspended sentence. He consequently had the right to be represented by counsel. Because he was not, Ferguson's conviction is invalid and cannot be used to enhance the subsequent criminal charge unless he waived his right to counsel.

Pet. App. 13-14.

The Utah Supreme Court also overturned the trial court's ruling on the applicable burden of proof when the State seeks to use a prior conviction to enhance guilt in a subsequent proceeding, and remanded the case for further proceedings to determine whether the record

demonstrated a constitutionally adequate waiver of Ferguson's right to counsel in the prior proceeding.

Summary of Facts

This case has not yet gone to trial. The only "facts" available come from testimony at the preliminary hearing and information placed in the record as part of the motion to dismiss the enhanced charge.

Ferguson lived with Julia Jepson for the twenty years prior to the incident in this case. R. 336:28. Three months before this incident, Jepson obtained a protective order prohibiting Ferguson from having contact with her. R. 221-25. The protective order included a requirement that Ferguson stay away from Jepson's workplace. R. 222.

Ferguson pled guilty to violating a protective order, a class A misdemeanor, on March 18, 2003. R. 109-11. He was not represented by counsel. R. 110-11. The trial court sentenced Ferguson to serve 365 days in jail, but gave him credit for time served and suspended the remaining jail sentence, placing Ferguson on probation. R. 110-11.

On March 24, 2003, a police officer saw a man, later identified as Ferguson, on the roof of a store located next to Jepson's place of employment. R. 336:8-13. The officer later found a rifle wrapped in a jacket on the roof. R. 336:12. The rifle was loaded with one bullet in the chamber. R. 336:13. Officers arrested Ferguson and took him to the Salt Lake County Jail where he remains.

REASONS FOR DENYING THE WRIT

Review is unwarranted for four independent reasons. First, this Court lacks jurisdiction because the state court decision is not a final judgment as required by 28 U.S.C. § 1257(a). Second, Petitioner's argument is not applicable in this case where Ferguson's sentence for the

prior conviction included credit for jail time served in addition to a suspended jail sentence. Third, there is no conflict in appellate authority on the issue Petitioner raises. Finally, the decision below is consistent with this Court's jurisprudence.

A. This Court Lacks Jurisdiction Because the Decision Below is Not Final.

This Court lacks jurisdiction to review the interlocutory order at issue in this case because the order of the Utah Supreme Court is not final as required by 28 U.S.C. § 1257(a). This is a criminal case that has not yet gone to trial; Ferguson has been held pretrial in the Salt Lake County Jail for more than four years while the State of Utah has pursued this appeal. Further trial court proceedings are necessary to determine whether the State will be permitted to use the prior conviction to support guilt for an enhanced charge. On remand, if the trial court rules that the State cannot use the prior conviction, the State of Utah will have the opportunity to again raise this issue in the Utah appellate courts. Accordingly, the Utah Supreme Court's decision is not final and certiorari should be denied.

The State appealed from an adverse trial court ruling precluding its use of an uncounseled misdemeanor conviction to enhance one of the charges in this case from a misdemeanor to a felony. On January 9, 2007, the Utah Supreme Court held that an uncounseled misdemeanor conviction obtained in violation of the Sixth Amendment, as outlined in *Shelton*, 535 U.S. 654, cannot be used to elevate a crime from a misdemeanor to a felony. Pet. App. 6-14. The Utah Supreme Court remanded the case for further proceedings to determine whether Ferguson knowingly and voluntarily waived his Sixth Amendment right to counsel when he pleaded guilty to the prior misdemeanor. Pet. App. 21.

The decision of the Utah Supreme Court does not qualify as a "final judgment or decree" as defined in § 1257(a) because the State has the ability to seek further appellate review of the

issue in the state courts should the trial court determine that Ferguson did not waive his right to counsel. Because Petitioner has the ability to seek further state review of this issue, this case does not fit within the narrow set of circumstances where this Court has considered an order or judgment to be final despite ongoing proceedings in lower state courts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (outlining circumstances where a state court decision on a federal issue is considered final under 28 U.S.C. § 1257(a) even though additional proceedings are anticipated in the lower state courts).

The State of Utah claims that the Utah Supreme Court's decision in this case is final under § 1257(a) because it falls within the third exception articulated in *Cox*. Pet. 1-3. That third category considers a state court judgment on a federal issue final when "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp.*, 420 U.S. at 481. Contrary to Petitioner's assertions, further review is available in the state court system should the trial court rule against the State on remand, that is, this is not a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.*

If the State of Utah were to prevail below by showing that Ferguson knowingly and voluntarily waived his Sixth Amendment right to counsel during the prior plea proceeding, the federal issue would be mooted. But if the State of Utah were to lose below on that issue, "governing state law [may] permit [the State] again to present [its] federal claims for review." *Id.*

Under Utah law, should the trial court hold that Ferguson did not knowingly and voluntarily waive his right to counsel in the prior proceeding, the State of Utah would again be

able to "seek discretionary appellate review of [the] interlocutory order . . . ." Utah Code Ann. § 77-18a-1(4) (Supp. 2006); Utah R. App. P. 5. In addition, the State has an appeal of right from a dismissal, "including a dismissal of a felony information following a refusal to bind the defendant over for trial." Utah Code Ann. §77-18a-1(3)(a) (Supp. 2006). Although Utah appellate courts have not addressed whether subsection (3)(a) applies when a felony is dismissed and an Information amended to charge a misdemeanor, the State would be in a position to argue that it does. To pursue either of these avenues for continued review, the State of Utah, like all other litigants, would simply be required to renew in the trial court the argument raised in this case, thereby preserving it for further review.

To the extent the State of Utah renews its argument in the trial court, it will then be free to pursue appellate review in the Utah courts on the issue it raises in this petition. *See* Utah Code Ann. § 77-18a-1(2)(a) & (4); Utah R. App. P. 5. And, critically, even if Utah appellate courts were to refuse to review on the merits the State's renewed claim based on the Utah Supreme Court's prior decision, "that determination will in no way limit [the Court's] ability to review the issue on final judgment." *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997); *see id.* ("'If a state court judgment is not final for purposes of Supreme Court review, the federal questions it determines will (if not mooted) be open in the Supreme Court on later review of the final judgment, whether or not under state law the initial adjudication is the law of the case on the second state review.'") (*quoting* R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 642 (4th ed. 1996)). Accordingly, this is not a situation "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case[,]" *Cox Broadcasting Corp.*, 420 U.S. at 481, and the Court lacks jurisdiction to review the decision below.

B. The State of Utah's Argument Does Not Apply to the Facts of this Case.

Certiorari is not warranted because Petitioner's argument that a suspended jail sentence can be excised, leaving a fine-only sentence and valid conviction that can be used for enhancement, does not apply to the facts in this case. The sentence in this case included credit for jail time served in addition to a fine and suspended jail sentence. R. 109-10. Although the record is not clear as to what, if any, time Ferguson may have served in the Salt Lake County Jail, the judgment from the prior conviction is clear that as part of the sentence, the trial court gave Ferguson credit for time served. R. 109-10. Because of the actual jail sentence imposed when the trial court gave Ferguson credit for time served - that is, Ferguson was effectively sentenced to jail time - the Sixth Amendment right to counsel attached to this conviction pursuant to *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972), as well as *Shelton*. Excising the suspended jail sentence, as advocated by the State of Utah, would leave a conviction with a sentence of a fine and credit for time served. According to *Argersinger*, the conviction would be invalid regardless of whether the suspended sentence could be excised since a jail sentence was imposed in violation of the Sixth Amendment. *See Argersinger*, 407 U.S. 25. Certiorari review is therefore not warranted since a conviction with a fine-only sentence would not exist in this case if the suspended jail sentence were excised.

C. Petitioner Has Not Identified a Split in Authority on the Issue It Asks This Court to Review.

The decision below that a misdemeanor conviction obtained in violation of *Shelton* and the Sixth Amendment cannot be used to support guilt for a subsequent charge does not, as Petitioner maintains, conflict with decisions of the United States Court of Appeals for the Tenth Circuit. Although the Tenth Circuit has remedied a Sixth Amendment violation by excising an offensive suspended jail sentence, the cases cited by the State of Utah do not go a step further

and allow the use of uncounseled convictions taken in violation of *Shelton* to enhance a subsequent charge. While some decisions have held that an appropriate remedy for a *Shelton* violation may in some cases include the removal of a suspended jail sentence, such a determination is not equivalent to a holding that an uncounseled misdemeanor conviction taken in violation of *Shelton* is sufficiently reliable for enhancement purposes once the offensive sentence is excised. Because the Tenth Circuit decisions do not reach the issue addressed below, they are not inconsistent with the decision of the Utah Supreme Court; nor does the State of Utah cite any case from any jurisdiction directly holding that a suspended jail sentence can be excised and the remaining conviction then used to enhance a subsequent charge. *See* Pet. 10-11.

In *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281 (10th Cir. 2000) (*see* Pet. 10), the Tenth Circuit granted Shayesteh's petition for writ of habeas corpus based on the violation of his Sixth Amendment right to counsel by one of Utah's non-record justice courts. The denial of counsel that Shayesteh suffered was sufficient to overcome the procedural default of not timely raising his claim that his right to counsel was violated because he received a jail sentence. *Id.* at 1284. The Tenth Circuit decided, however, that because a defendant does not have the right to counsel for a misdemeanor when a fine is imposed, the right to counsel did not overcome Shayesteh's procedural default in regard to the fine aspect of his sentence. Accordingly, pursuant to its previous decision in *United States v. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991), the court struck Shayesteh's suspended jail sentence but left the fine and restitution in place. *Shayesteh* did not consider whether the conviction could be used to enhance a subsequent charge and therefore is not inconsistent with the decision below.

Reilley likewise did not address the issue of whether a conviction rendered in violation of the Sixth Amendment right to counsel can be used to enhance a subsequent charge. *See id.*

Reilley was decided prior to *Shelton* but reached the same decision, holding that the Sixth Amendment right to counsel attaches to a conviction when a defendant receives a suspended sentence of incarceration. *Id.* Because Reilley was denied counsel, the Tenth Circuit struck the suspended sentence of incarceration but left the fine in place. *Id.* at 654. The court did not address the enhancement question decided in this case, and its holding therefore does not conflict with the decision below.

The other cases cited by Petitioner in support of the purported split in authority also do not address the issue decided below. *See* Pet. 10-11. Rather than analyzing whether a conviction obtained in violation of *Shelton* and the Sixth Amendment may be used to support guilt for a subsequent charge, two of those cases, both pre-*Shelton*, analyze the remedy for a violation of the right to counsel in misdemeanor cases where the sentence is comprised of a fine and suspended sentence of incarceration. *See, e.g., United States v. Ortega*, 94 F.3d 764, 769 (2d Cir. 1996) ("The appropriate remedy for a *Scott* violation, therefore, is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself"); *United States v. White*, 529 F.2d 1390, 1394 (8th Cir. 1976) (vacating suspended sentence of incarceration, but affirming conviction and fine). Because these cases did not reach the issue of whether the convictions could be used to enhance a subsequent charge, their holdings do not conflict with the decision below.

The remaining case cited by Petitioner likewise does not demonstrate a split in authority on the issue addressed below. *See* Pet. 11. *State v. Stott*, 586 N.W.2d. 436, 438 (Neb. 1998), simply follows *Argersinger* and holds that a misdemeanor conviction with a sentence of actual incarceration is invalid where the defendant's right to counsel was violated. *See id.* Because

Stott did not involve a suspended sentence, it did not address the question of the validity of a conviction when a suspended sentence is imposed nor the enhancement issue addressed below.

D. This Court's Case Law Demonstrates that a Conviction Obtained in Violation of the Sixth Amendment as Outlined in *Shelton* is Not Sufficiently Reliable to Support an Enhanced Charge in a Subsequent Case.

Relying on this Court's case law, the Utah Supreme Court correctly concluded that a prior misdemeanor conviction obtained in violation of the Sixth Amendment pursuant to *Shelton* is not sufficiently reliable to enhance a subsequent charge to a felony. Pet. App. 6-14. As the court stated:

> While the *Shelton* opinion affirmed the decision of the Alabama Supreme Court, which had invalidated the incarceration portion of Shelton's sentence, the Court did not explicitly address the validity of Shelton's underlying conviction. . . . We therefore examine *Shelton* and other United States Supreme Court precedent further. We agree with the court of appeals that 'the State reads too much into *Shelton's* result.' Both the procedural history and the plain language of the *Shelton* opinion suggest that a conviction obtained in violation of the Sixth Amendment is invalid for all purposes and therefore cannot be used to enhance a subsequent criminal charge.

Pet. App. 9-10 (footnote omitted). The lower court's decision does not warrant review since it is consistent with *Shelton* and other case law from this Court.

The Sixth Amendment right to counsel is essential to a fair and reliable conviction. *Id.*; *see also Shelton*, 535 U.S. at 667. The right to counsel is fundamental, and without counsel, "'[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (further citation omitted). The right to counsel applies whenever a defendant is imprisoned, regardless of whether the conviction is for a misdemeanor or felony, and also whenever a suspended jail sentence is imposed. *Shelton*, 535 U.S. at 674; *Argersinger*, 407 U.S. at 32. When the right to counsel attaches, a conviction is not sufficiently reliable to support an actual or suspended

sentence of incarceration unless the defendant was afforded counsel or made a constitutionally adequate waiver of counsel. *Shelton*, 535 U.S. at 654; *Argersinger*, 407 U.S. at 31-37.

This Court recognized in *Shelton* that "the key Sixth Amendment inquiry [is] whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration." *Shelton*, 535 U.S. at 667. A conviction obtained in violation of the right to counsel "has never been subjected to 'the crucible of meaningful adversarial testing'" and the adjudication of guilt is not sufficiently reliable to support a suspended sentence of incarceration. *Id.* (further citations omitted). As the court below pointed out, "[*Shelton*] repeatedly described the Sixth Amendment as protecting against invalid convictions, not merely invalid sentences." Pet. App. 10.

> While the Supreme Court did not explicitly address the constitutionality of the specific remedy ordered by the Alabama court, it nevertheless implied that a conviction obtained in violation of the Sixth Amendment, not merely the offending sentence, would be constitutionally infirm. It repeatedly described the Sixth Amendment as protecting against invalid convictions, not merely invalid sentences. The Court reiterated that the Sixth Amendment protects against invalid convictions by stressing that a defendant cannot be 'jailed absent a *conviction* credited as reliable.' It also indicated that a 'defendant ha[s] a recognized right to counsel when *adjudicated* guilty,' emphasizing that the Sixth Amendment right applies to the conviction itself, not only to the sentence. Nowhere did the Court indicate that an offending sentence could be severed from an invalid conviction, somehow resurrecting the conviction's validity as the State suggests here.

Pet. App. 10-11 (emphasis in original and citations and footnotes omitted).

Contrary to the State of Utah's assertions, the decision below does not conflict with *Shelton*. The Utah Supreme Court recognized that in *Shelton* this Court did not address "the validity of the underlying conviction and the nonincarceration components of Shelton's sentence." Pet. App. 10. Nor did this Court hold or even suggest in *Shelton* that the conviction was sufficiently reliable to enhance a subsequent charge even though it was not reliable enough to support a suspended sentence. Pet. App. 11. Instead, "[this Court's] affirmance in *Shelton* is

an indication of its agreement with the Alabama court's ruling that the suspended sentence gave rise to a Sixth Amendment violation." Pet. App. 10. Although the State of Utah focuses on this Court's affirmance of the Alabama court's remedy as the basis for its argument, both Utah appellate courts agreed that "'the State reads too much into *Shelton's* result.'" Pet. App. 9-10 (further citation omitted).[1]

The State's reliance on *Scott v. Illinois*, 440 U.S. 367 (1979), and *Nichols v. United States*, 511 U.S. 738 (1994), is also misplaced. *See* Pet. 7-9. In *Scott*, this Court held that the right to counsel does not attach to a misdemeanor when the defendant is sentenced to a fine only. *Scott*, 440 U.S. 367. Subsequently, this Court held in *Nichols* that a conviction valid under *Scott* could be considered at sentencing. *Nichols*, 511 U.S. at 749. The decision in *Nichols* to allow a misdemeanor with a fine-only sentence to be considered at sentencing in a subsequent case was based on two factors: (1) pursuant to *Scott*, the Sixth Amendment right to counsel does not apply to a misdemeanor when the only sentence is a fine; and (2) a conviction considered for sentencing purposes is examined under the "less exacting" procedure utilized in sentencing hearings. *Nichols*, 511 U.S. at 747. Neither of these factors apply in this case because (1) the right to counsel attached to the prior conviction since Ferguson received a suspended jail sentence; and (2) the State of Utah seeks to use the prior conviction to support guilt rather than under the "less exacting" procedure applicable to sentencing hearings. *Nichols* therefore does not support the State of Utah's claim.

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[1] The State of Utah is incorrect when it asserts that the Utah Supreme Court reversed Ferguson's conviction. Pet. 9. While the trial court ruled that Ferguson's prior conviction could not be used for enhancement purposes, the Utah Supreme Court reversed that ruling and remanded the case for further proceedings to determine whether Ferguson's prior conviction was obtained in violation of the Sixth Amendment. Pet. App. 21. As the case now stands, it is uncertain whether the State of Utah will be able to rely on the prior conviction to enhance the protective order violation charged in this case.

This Court's decision in *Shelton* further demonstrates that *Nichols* does not support Petitioner's claim. First, this Court made clear in *Shelton* that *Nichols* did not "alter[ ] or diminish[] *Argersinger's* command . . . [that the Sixth Amendment applies to any offense for which a sentence of imprisonment is imposed]." *Shelton*, 535 U.S. at 664 (further citations omitted). Instead, *Nichols* "highlight[s] that the Sixth Amendment inquiry trains on the stage of the proceedings corresponding to Shelton's Circuit Court trial, where his guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined." *Shelton*, 535 U.S. at 665. Second, this Court emphasized that *Nichols* was distinguishable because it applied a "'less exacting' standard 'consistent with the traditional understanding of the sentencing process.'" *Shelton*, 535 U.S. at 665 (*citing Nichols*, 511 U.S. at 747.) The Court reiterated that "[o]nce guilt has been established, we noted in *Nichols*, sentencing courts may take into account not only 'a defendant's prior convictions, but . . . also [his] past criminal behavior, even if no conviction resulted from that behavior.'" *Id.* (*quoting Nichols*, 511 U.S. at 747) (ellipsis and alteration in original).

Because a misdemeanor conviction with a fine-only sentence does not demand Sixth Amendment protection, such a conviction can be considered pursuant to the "less exacting" standards of a sentencing hearing. *Shelton*, 535 U.S. at 665; *Nichols*, 511 U.S. at 747. By contrast, when a conviction is not reliable because it was obtained in violation of the right to counsel, as here, the conviction is not sufficiently reliable to support guilt so as to enhance a subsequent charge from a misdemeanor to a felony.

Petitioner's position is at odds with *Burgett v. Texas*, 389 U.S. 109 (1967). There, this Court held that a conviction obtained in violation of *Gideon* and the Sixth Amendment cannot "be used against a person either to support guilt or enhance punishment for another offense." *Id.*

at 115. That, the Court held, would "erode the principle of [*Gideon*]" and cause a defendant to "suffer[] anew from the deprivation of that Sixth Amendment right [to counsel]." *Id.*

In determining whether Burgett's right to counsel had been violated, the Court indicated that the judgment of the prior conviction raised on its face a presumption that Burgett's right to counsel was violated because it showed that he proceeded without counsel. *Id.* Although *Parke v. Raley*, 506 U.S. 20 (1992), later clarified that this presumption applied only because the judgment in *Burgett* was entered prior to *Gideon*, *Raley* otherwise left the decision in *Burgett* in place. *Raley*, 506 U.S. at 27-28, 31; *see generally Custis v. United States*, 511 U.S. 485, 495-97 (1994) (reaffirming *Burgett* and indicating that "the admission of a prior crimianl conviction that is constitutionally infirm under the standards of *Gideon* is inherently prejudicial and to permit use of such a tainted conviction for sentence enhancement would undermine the principle of *Gideon*" (citation omitted)). Because a conviction obtained in violation of *Shelton* "is constitutionally infirm under the standards of *Gideon*" (*Custis*, 511 U.S. at 495), *Burgett* precludes the use of such a conviction to enhance a subsequent charge.

Iowa v. Tovar, 541 U.S. 77 (2004), also does not support the State of Utah's argument that a conviction obtained in violation of *Shelton* and the Sixth Amendment can be used to support guilt in a subsequent charge. *Tovar* did not address the issue of whether a prior conviction taken in violation of *Shelton* could be used to enhance a subsequent charge. Instead, *Tovar* reaffirmed that the right to counsel applies in a misdemeanor case when a defendant faces incarceration, and such right must be knowingly and voluntarily waived if the defendant proceeds without counsel. Although the specific warnings mandated by the Iowa Supreme Court are not necessary to establish a knowing and voluntary waiver, the record must nevertheless demonstrate that under the circumstances of the case, the defendant "'knows what he is doing

and his choice is made with his eyes open.'" *Id.* at 88 (further citation omitted). The State of Iowa's concession in *Tovar* that a prior conviction obtained in violation of the right to counsel could not be used to enhance a subsequent charge further suggests that the State of Utah's claim is inconsistent with this Court's jurisprudence. *Id. n.10.*

Just as a conviction obtained in violation of the right to counsel is not sufficiently reliable to support a suspended jail sentence, it is not sufficiently reliable to increase the level of a subsequent crime from a misdemeanor to a felony. *See generally Burgett*, 389 U.S. at 114 (holding that Sixth Amendment precludes the use of a prior conviction obtained in violation of *Gideon* to support guilt or enhance a sentence for a subsequent charge); *United States v. Tucker*, 404 U.S. 443, 447-49 (1972) (indicating that a sentence cannot be based on convictions obtained in violation of *Gideon*); *Nichols*, 511 U.S. at 743 n.9 (recognizing that prior decisions hold that felony convictions obtained in violation of *Gideon* cannot be used to support guilt or enhance a sentence). Certiorari is not warranted because the lower court's decision is consistent with this Court's decisions.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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